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No. 98-_____

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

Los Angeles Police Department,
Petitioner,

v.

United Reporting Publishing Corp.,
Respondent.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

James K. Hahn
Frederick N. Merkin
Byron R. Boeckman
Office of the City Attorney
1800 City Hall East
200 N. Main St
Los Angeles, CA 90012

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

(additional counsel on inside cover)

October 23, 1998

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

(Counsel for Petitioner continued)

Jonathan D. Schiller

Thomas C. Goldstein

BOIES & SCHILLER LLP

5301 Wisconsin Ave., NW

Suite 570

Washington, DC 20015

QUESTION PRESENTED

The Ninth Circuit in this case declared unconstitutional Cal. Gov't Code 6254(f)(3), under which persons may receive the addresses of arrestees and crime victims "for a scholarly, journalistic, political, or governmental purpose, [or] for investigation purposes by a licensed private investigator," but only if they agree not to use the information "directly or indirectly to sell a product or service." The Ninth Circuit invalidated Section 6254(f)(3) on the ground that the statute violates the commercial speech rights of persons and businesses that wish to sell address information to lawyers, insurance companies, and others. There is a widely acknowledged and irreconcilable conflict in the lower courts on the issue: the Fifth and Eleventh Circuits have struck down the parallel statutes of Texas and Georgia; the Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court have reached the opposite conclusion.

The question presented is whether the government violates the First Amendment when it releases records but forbids their commercial use?

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PETITION FOR A WRIT OF CERTIORARI

The Los Angeles Police Department respectfully petitions
for a Writ of Certiorari to review the judgment of the United
States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's opinion (Pet. App. 9a-23a (per Brewster, J.)) is published at 946 F. Supp. 822. The Ninth Circuit's opinion (Pet. App. 24a-36a (per O'Scannlain, J., joined by Farris and Fernandez, JJ.)) is published at 146 F.3d 1133.

JURISDICTION

The Ninth Circuit entered its judgment on June 25, 1998. On September 15, 1998, Justice O'Connor extended the time to file this Petition to and including October 23, 1998. Application No. A-231. Petitioner invokes the jurisdiction of this Court under 28 USC 1254(1).

Pursuant to S. Ct. R. 14(e)(v), Petitioner notes that, because this action calls into question the constitutionality of a state statute, 28 USC 2403(b) may apply. In compliance with S. Ct. R. 29.4(c), this Petition is being served on the Attorney General of the State of California. Although the Ninth Circuit did not certify to the State Attorney General the fact that the constitutionality of a state statute was drawn into question (*see* S. Ct. R. 29.4(c)), the State Attorney General (i) was a party to the district court proceedings, (ii) is subject to the injunction entered by the district court, and (iii) declined to appeal the district court's ruling to the Ninth Circuit.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The statute relevant to this Petition, Cal. Gov't Code 6254(f)(3) is reprinted in full in the Appendix (6a-8a), but is reproduced here in relevant part:

[S]tate and local law enforcement agencies shall make public the following information . . .

(3) [T]he current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly,

journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator . . . , except that the address of the victim of [certain specified crimes] shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

STATEMENT

1. Law enforcement officials around the country collect a wide variety of information in the ordinary course of their duties, including the addresses of crime victims and of suspects who are arrested. In 1996, California amended its public records laws to limit carefully the disclosure of this address information. Cal. Gov't Code 6254(f)(3) now provides that addresses of arrestees and crime victims shall not be publicly available but instead may be disclosed only "for a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." Any recipient of addresses under this provision must furthermore certify that the information will "not be used directly or indirectly to sell a product or service." *Id.*

By providing for the release of various government records to the press and others *so long as* those records are not used for commercial or solicitation purposes, Section 6254(f)(3) mirrors more than eighty statutes adopted by the federal government and thirty-eight different states. Pet. App. 1a-5a. Thirteen states, including California, specifically apply this restriction to some or all police report information. *Id.* 1a. Statutes in ten states prohibit the commercial use of not just police reports but most government records. *Id.* Dozens of other federal and state statutes similarly prohibit the commercial use of several other classes of government records, including election and public assistance records. *Id.* 3a-4a.

2. Prior to the enactment of Section 6254(f)(3), Respondent United Reporting Publishing Corporation sold lists of the names and addresses of arrestees to attorneys, insurance companies, driving schools, and others. Pet. App. 11a. Upon the statute's enactment, Respondent sued Petitioner Los Angeles Police Department and others in federal district court alleging that the statute would prevent it from lawfully selling address information. Respondent alleged, *inter alia*, that the statute was facially invalid under the First Amendment because it infringed upon Respondent's commercial speech right to disseminate this information. *Id.*

The district court agreed and permanently enjoined the enforcement of Section 6254(f)(3). The district court began by acknowledging not only that “[c]ourts have uniformly” concluded that “there is no constitutional right, and specifically no First Amendment right, of access to all governmental records,” but also that “[t]he First Amendment directly protects the expression of information already obtained; it does not guarantee access to the sources of information.” Pet. App. 12a-13a. The court also recognized that Section 6254(f)(3) prohibits only the acquisition of a government record, not any communication by Respondent. The district court therefore acknowledged that California “could constitutionally prevent everyone from having access to this information.” *Id.* 14a.

The district court nonetheless found that the statute implicates the First Amendment because it “makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech.” *Id.* 14a.¹

¹ The district court did not provide any explanation for its statement that Section 6254(f)(3) prohibits only the *commercial* use of address information. The plain text of the statute provides that address information shall be released only “for a scholarly, journalistic, political, or governmental purpose, [or] for investigation purposes by a licensed private investigator.” Respondent has asserted that the categories of permissible recipients set forth in Section 6254(f)(3) are so vague that, in effect, only commercial users are excluded. E.g., Resp. C.A. Br. at 3. Respondent has offered no authority or explanation for this claim, and we submit that the terms of Section 6254(f)(3) are unambiguous. To take the simplest case, there is no question that a member of the general public engaged in curiosity seeking is prohibited by Section 6254(f)(3) from receiving address information. In any

Based on its view that Section 6254(f)(3) implicates Respondent's commercial speech rights, the court analyzed the statute under the four-part test set forth by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980):

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id. at 566. The district court found the first two *Central Hudson* prongs to be satisfied in this case: the parties did not dispute that Respondent's sales of arrestee information were lawful and not misleading; and the court found that California has a substantial interest in, *inter alia*, protecting the privacy of arrestees by restricting the dissemination of address information. Pet. App. 17a.

Regarding the third *Central Hudson* prong, the district court recognized that the courts which have “dealt with statutes substantially similar to Cal. Gov. Code § 6254(f) split on whether the statutes materially advanced the state's interest in protecting the privacy of its citizens.” Pet. App. 19a. For example, in *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, cert. denied, 513 U.S. 1044 (1994), the Tenth Circuit upheld Colorado's parallel statute on the ground that the state's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of arrestees. Pet. App. 19a (citing *Lanphere*, 21 F.3d at 1515).

event, when as here the plaintiff challenges the facial validity of a statute, courts properly construe the statute to avoid constitutional concerns, not create them. *Ohio v. Akron Ctr. For Reproductive Health*, 497 U.S. 502, 514 (1990).

The district court in this case considered but expressly rejected the Tenth Circuit's view, reasoning that Section 6254(f)(3) "still allows [the individual's] name and address to be published in the newspapers, broadcast on television, and/or obtained by an employer or even an enemy. These are potentially much more pervasive invasions of privacy, yet the statute allows them." *Id.* 21a. The district court also doubted that Respondent's conduct led to unwarranted invasions on individual privacy: "If [the recipients] don't like the solicitation, they can simply throw it away." *Id.* On this basis, the district court concluded that Section 6254(f)(3) fails the *Central Hudson* inquiry and is unconstitutional. Pet. App. 22a.²

3. On Petitioner's appeal, the Ninth Circuit affirmed, agreeing with the district court that Section 6254(f)(3) fails to advance materially the state's interest in privacy. Pet. App. 24a. The court reasoned from its earlier decision in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997), cert. denied, 118 S. Ct. 1050 (1998). *Valley Broadcasting* invalidated a federal ban on broadcast advertisements of casino gambling on the ground that statutory exceptions for other forms of gaming advertisements rendered the statute ineffectual. According to the opinion below, "Likewise here, we are compelled to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment." *Id.* at 35a. The court continued:

It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses

² The district court also raised a concern that the statute may have "been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." Pet. App. 21a. This is an unfair characterization of the statute, which equally restricts the release of the addresses of crime victims. In any event, the Ninth Circuit did not echo this concern on appeal, and it therefore did not play any part in the judgment below.

of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes. Having one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally).

Id.

The Ninth Circuit recognized that the Tenth Circuit had upheld Colorado's parallel statute in the *Lanphere* case. Pet. App. 33a-34a & n.4. The Ninth Circuit concluded, however, that because the Tenth Circuit's analysis conflicted with Supreme Court precedent and with the Ninth Circuit's own decision in *Valley Broadcasting*, "[t]he district court was correct not to follow *Lanphere*." *Id.*

This Petition followed.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS AND STATE SUPREME COURTS ARE IRRECONCILABLY DIVIDED ON THIS FREQUENTLY RECURRING QUESTION OF FEDERAL LAW.

1. This Court should grant certiorari to resolve the well-recognized division in the lower courts over whether, under the First Amendment, the government may release police reports for journalistic and other purposes but not for commercial use. Eighteen such statutes exist in thirteen states. Pet. App. 1a-2a. Eleven such statutes have been challenged on First Amendment grounds. *Id.*

The split in the appellate courts on the constitutionality of statutes prohibiting the commercial use of police report information is three to three. The Tenth Circuit, Louisiana Supreme Court, and South Carolina Supreme Court have found such measures to be constitutional. *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir.), cert. denied, 513 U.S.

1044 (1994); *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), cert. denied, 510 U.S. 1117 (1994); *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E.2d 346 (S.C. 1995). On the other hand, the Fifth, Ninth, and Eleventh Circuits have struck down the statutes of Texas, California, and Georgia. Pet. App. 24a; *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994); *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993). District courts have struck down separate Georgia and Texas statutes, as well as the statutes of Florida, Kentucky, and New Mexico.³ *Statewide Detective Agency v. Miller*, No. 96-cv-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); *Babkes v. Satz*, 944 F. Supp. 909 (S.D. Fla. 1996); *Amelkin v. Commissioner*, 936 F. Supp. 428 (W.D. Ky. 1996); *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Tex. 1994), on appeal of separate issue, aff'd in part and rev'd in part, 63 F.3d 358 (5th Cir. 1995), cert. denied, 516 U.S. 1115 (1996); *LaSalle v. Udell*, Case No. 94-0404-M, Unpublished Opinion and Order (D.N.M. Feb. 16, 1996).⁴

2. In *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, the Tenth Circuit sustained a Colorado statute providing that law enforcement records "and the names, addresses, telephone numbers, and other information in such records shall not be used by any person for the purpose of soliciting business for pecuniary gain." Unlike the Ninth Circuit, which subjected

³ The Oregon Court of Appeals invalidated that state's statute based on the free speech provision of the state Constitution. *Zackheim v. Forbes*, 895 P.2d 793 (1995). The statute subsequently was repealed.

⁴ Petitioner notes for the Court's benefit a few additional facts about the history and procedural posture of these district court cases. First, the district court's *Amelkin* decision, which invalidated the Kentucky statute, currently is on appeal to the Sixth Circuit, which has twice previously invalidated injunctions against the same statute's enforcement for failure to follow FRCP 65. *Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997); *Amelkin v. McClure*, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996). Second, in an interlocutory appeal of *Statewide Detective Agency v. Miller*, the Eleventh Circuit sustained a preliminary injunction entered by the district court against the enforcement of the Georgia statute. 115 F.3d 904 (1997). Third, the Texas statute at issue in the *Moore v. Morales* case (Tex. Civ. Stat. Ann. Art. 6701(d), § 45(a)) subsequently was repealed.

Cal. Gov't Code § 6254(f)(3) to stringent review as a ban on commercial speech, the Tenth Circuit concluded that it was inappropriate to require a strict "fit" between the Colorado statute's means and ends because the state "has not completely banned direct mail solicitation for pecuniary gain of any particular group. The State has instead established an indirect barrier to commercial speech by not making certain records available for that purpose." *Id.* at 1515. The Tenth Circuit also expressly rejected the contention, which is central to the Ninth Circuit's ruling in this case, that various exceptions render the statute ineffectual:

Plaintiffs contend that the State's asserted privacy interest is only chimerical because the identity of those charged may be available through other sources such as local newspapers. However, even if the information is available to some degree through other sources, the state's interest in not aiding in the dissemination of the information for commercial purposes remains. We presume that plaintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue.

Id. at 1514.

The district court and Ninth Circuit in this case both openly acknowledged a square conflict with the Tenth Circuit's decision in *Lanphere*. Pet. App. 19a, 33a-34a. Prior to the ruling in this case, the conflict between *Lanphere* and the Fifth and Eleventh Circuits' decisions in *Speer* and *Innovative Database Systems* was widely recognized. As the district court for the Western District of Kentucky explained in analyzing that state's commercial-use prohibition:

A close question is presented to the Court as to the constitutionality of the statutes challenged by the plaintiffs. There is a conflict in the decisions of the Eleventh Circuit and the Tenth Circuit as evidenced by the decisions in *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994), and *Lanphere & Urbaniak v. State*

of Colorado, 21 F.3d 1508 (10th Cir. 1994). In addition, the decisions in *Moore v. Morales*, 843 F. Supp. 1124 (S.D. Texas 1994), and *Innovative Database Systems v. Morales*, 990 F.2d 217 (5th Cir. 1993), hold that Texas may not prohibit chiropractors or attorneys from receiving access to motor vehicle accident reports on the grounds that they will use the information for financial gain.

Amelkin v. Commissioner, 936 F. Supp. 428, 429 (W.D. Ky. 1996). A federal court reviewing one of Georgia's several commercial-use prohibitions similarly has recognized that the Eleventh Circuit's *Speer* ruling "is in conflict with the Tenth Circuit's finding that the Colorado statute banning lawyers but not the media from accessing certain government records advanced a substantial interest in protecting the privacy of the people listed in the protected government records." *Speer v. Miller*, 864 F. Supp. 1294, 1301 (N.D. Ga. 1994). And, in a challenge to one of Florida's commercial-use prohibitions, the state similarly "urge[d] the Court to follow *Lanphere & Urbaniak v. Colorado*," but the court refused, explaining that "[t]his argument ignores that *Speer v. Miller*, 15 F.3d 1007 (11th Cir. 1994) is binding precedent on this Court." *Babkes v. Satz*, 944 F. Supp. 909, 913 n.4 (S.D. Fla. 1996).

3. The Ninth Circuit's decision in this case also is in direct conflict with rulings of two state supreme courts. *DeSalvo v. Louisiana*, 624 So. 2d 897 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994), sustained a statute that permitted the release of accident reports to parties involved in the accident, insurers, driving records contractors, and the press, but not to businesses for commercial purposes. *Id.* at 898. The Louisiana Supreme Court applied a "less stringent test" in reviewing the statute because the commercial-use prohibition only "indirectly results in a stricture upon the flow of information or ideas because of a government measure seeking a goal independent of the communicative content or impact of the speech." *Id.* at 900. Under this test, the court sustained the statute because it "narrowly focuses on the state's substantial interest in protecting the right of privacy of individuals. . . . The plenary

power of the legislature, in exercising the police power of the state, to make all laws necessary and proper to that end is broad and sweeping." *Id.* at 901 (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) ("The State's interest in protecting the well being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.")); *see also Northern Kentucky Chiropractic v. Ramey*, No. 95-5645, 1997 U.S. App. LEXIS 1734 (6th Cir. Jan. 29, 1997) (Nelson, J., concurring) (recognizing that *DeSalvo* and *Lanphere* conflict with decisions of Fifth and Eleventh Circuits).

In *Walker v. South Carolina Department of Highways & Public Transportation*, 466 S.E.2d 346 (1995), the South Carolina Supreme Court similarly sustained a statute prohibiting the release of police accident reports "for commercial solicitation purposes." The court concluded that the statute did not implicate the First Amendment because it "regulates only access to information; it in no way inhibits [the plaintiff's] exercise of her free speech rights in the form of direct mail to prospective clients." *Id.* at 348. Moreover, citing the Tenth Circuit's decision in *Lanphere*, the court made clear that it would sustain the statute under a First Amendment analysis: "Even if the first amendment applied, the State's interest in protecting the privacy of victims is sufficient to justify the statute's restriction on commercial solicitation." *Id.*

3. Certiorari also is warranted because the decision below directly implicates two other important conflicts in the lower courts. First, the circuits disagree over whether restrictions on commercial speech are invalid if they contain exceptions permitting the publication of similar information in other forms. The Ninth Circuit in *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, *cert. denied*, 118 S. Ct. 1050 (1998), invalidated a federal ban on casino gambling because the statute permits other forms of gaming advertisements. *See supra* at 3. The Fifth Circuit, however, recently upheld the same statute, expressly rejecting the stringent test applied by the Ninth Circuit. *Greater New Orleans Broadcasting Ass'n v. United States*, 149 F.3d 334, *pet. for cert. pending*, No. 98-387 (Sept. 2, 1998). That conflict applies fully here. Applying

Valley Broadcasting, the Ninth Circuit in this case invalidated Section 6254(f)(3) because the statute contains exceptions under which the state provides address information to the press, scholars, and investigators. Pet. App. 35a. The Tenth Circuit and Louisiana and South Carolina Supreme Courts, by contrast, have refused to review such exceptions stringently and have concluded that the statutes sufficiently advance the government's interest in protecting individual privacy.

Second, the lower courts have divided over the constitutionality of a closely related commercial-use prohibition involving campaign records. The federal government and many states permit the release of campaign contribution records, but only so long as the recipient agrees not to use the information for commercial or solicitation purposes. Pet. App. 3a-4a. The *en banc* D.C. Circuit upheld the federal statute in *FEC v. International Funding Institute*, 969 F.2d 1110, *cert. denied*, 506 U.S. 1001 (1992), despite the fact that “[t]he information in the report submitted by a political committee may freely be copied, published, and with one exception, used in any way.”⁵ *Id.* at 1117. The Supreme Court of Missouri, however, invalidated that state's parallel statute in *Ryan v. Kirkpatrick*, 669 S.W.2d 215 (1984) (*en banc*), and the Second Circuit has narrowly construed the federal provision in light of serious concerns about its constitutionality, *FEC v. Political Contributions Data*, 943 F.2d 190 (1991).

4. The extraordinary importance of this question to the administration of state and federal public records law is beyond question. Thirteen states prohibit the use of police report information for commercial purposes. Pet. App. 1a-2a. Moreover, the principle at stake has far greater application because so many state and federal laws permit the release of

⁵ Then-Judge Ruth Bader Ginsburg joined the Court's opinion but also concurred separately to note that the commercial-use restriction was valid because it does not have “the effect of favoring a particular speaker or set of ideas.” 969 F.2d at 1119. Moreover, the statute permits solicitors to “contact[] the very individuals whose names appear on the FEC lists they inspect (so long as the solicitees' names are obtained from an independent source).” *Id.*

government records but forbid their use for commercial purposes. Campaign contribution statutes of the kind at issue in the *International Funding Institute* and *Ryan* cases are just one example.⁶ In total, the federal government and thirty-eight different states prohibit the use of various government records for commercial purposes through more than eighty different statutes. Pet. App. 1a-5a.

5. No purpose is served by permitting the conflict to percolate further in the lower courts, which already have addressed the constitutionality of eleven indistinguishable statutes that prohibit the commercial use of police report information. Pet. App. 1a-2a. The question has been addressed by four different federal courts of appeals and two state supreme courts, which have sustained the statutes of Colorado, Louisiana, and South Carolina, but invalidated those of California, Georgia, and Texas. *See supra*. Only a decision by this Court can produce a consistent and coherent application of the First Amendment regarding this important and recurring issue.

II. THE DECISION BELOW IS ERRONEOUS.

Certiorari also is warranted because the ruling below conflicts with this Court's First Amendment precedents. The constitutionality of Section 6254(f)(3) can be analyzed under the four-prong test set forth by this Court in *Central Hudson*. But any such analysis must account for the state's wide discretion in releasing government records and also the extremely indirect burden on Respondent's speech that Section 6254(f)(3) imposes. The Ninth Circuit, however, analyzed Section 6254(f)(3) as if it were a complete prohibition on

⁶ For example, two First Amendment challenges recently have been brought against a provision of the Driver's Privacy Protection Act that permits the release of state driver's license information, but not for commercial purposes. 18 U.S.C. §§ 2721-22; *Condon v. Reno*, 155 F.3d 453 (4th Cir. 1998) (disposing of case on alternative Tenth Amendment ground); *Loving v. United States*, No. 97-6060, 1997 U.S. App. LEXIS 23639 (10th Cir. Sept. 8, 1997) (disposing of case on standing grounds).

Respondent's speech. In so extending the protections afforded to commercial speech, the Ninth Circuit seriously undermined this Court's decisions governing the right of access to public records. Moreover, the stringent review applied by the Ninth Circuit erroneously led it to conclude that Section 6254(f)(3), by providing address information to the press, scholars, and investigators, fails to advance the state's interest in protecting individual privacy.

1. Restrictions on the release of government records do not violate the First Amendment. "This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control." *Houchins v. KQED*, 438 U.S. 1, 8 (1978) (plurality opinion). To the contrary, when the government decides to release information, "the processes thereunder are a matter of legislative grace." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984). In fact, the Court has encouraged state governments to "establish and enforce procedures" governing the release of "sensitive information [in their] custody," as "a less drastic means than punishing truthful publication [to] guard[] against the dissemination of private facts." *Florida Star v. BJF*, 491 U.S. 524, 534 (1989).

The Ninth Circuit ignored these precedents and instead recast Section 6254(f)(3) as a restriction on Respondent's right to disseminate address information, notwithstanding that the statute does not restrict commercial speech in any sense previously recognized by this Court. "[T]he test for identifying commercial speech" is whether the subject of government regulation "propose[s] a commercial transaction." *Board of Trustees v. Fox*, 492 U.S. 469, 473 (1989) (quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976)). Respondent proposes a commercial transaction when it advertises to attorneys, insurance companies, and others that it has address information for sale. As the Ninth Circuit itself recognized, Respondent's "speech can be reduced to, 'I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price.'" Pet. App. 29a (alterations in original). Section 6254(f)(3) does not

interfere with such an advertisement. To the contrary, Respondent "may disseminate the identical information . . . as long as the information is gained through means independent of" state arrest records. *Seattle Times Co.*, 467 U.S. at 33.

Nor does Section 6254(f)(3) constitute an impermissible *indirect* burden on Respondent's speech. Respondent contends that it cannot advertise that it has address information available for sale for the simple reason that Section 6254(f)(3) forbids Respondent from acquiring that information. But such a restriction does not violate the First Amendment; as with all government determinations regarding the release of records, it is a matter of legislative grace. Thus, in *Zemel v. Rusk*, the Court rejected the argument that the federal ban on travel to Cuba interfered with the First Amendment right to gather information about the effects of U.S. policy:

[There] are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

381 U.S. 1, 16-17 (1965).

2. The remaining contention of the court of appeals – that Section 6254(f)(3) is invalid because it is irrational – is erroneous as well. According to the Ninth Circuit, "[i]t is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes." Pet. App. 35a. But although the press may frequently report the names of persons who have been arrested, experience suggests that such reports rarely include the arrested person's address,

which is the one piece of information withheld from Respondent by Section 6254(f)(3). For this reason, California (like the other states with similar statutes) reasonably could conclude that commercial access to address information would result in direct solicitations of arrestees or the creation of unreliable data banks of criminal history data, and that these commercial uses of address information would constitute an invasion of privacy of a different order of magnitude than any reporting by the press. *Accord Lanphere*, 15 F.3d at 1514 ("[P]laintiffs would not be involved in this litigation if the information they seek is so widely available that the privacy of the accused is no longer at issue.").

The Ninth Circuit's contrary conclusion – that the government must make such records available to everyone or to no one at all – is not supported by this Court's precedents. For example, in *Nixon v. Warner Communications*, 435 U.S. 589, 594, 609 (1978), the Court refused to require the release of the Nixon tapes to businesses seeking to "sell to the public the portions of the tape played at the trial [of various White House officials]" despite the fact that "the contents of the tapes were given wide publicity by all elements of the media." *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), is not to the contrary. In that case, the government irrationally attempted to distinguish *within* classes of commercial speech in several respects: by permitting the publication of alcohol-strength data in advertisements but not on beer labels; by nonetheless permitting the use of the phrase "malt liquor" on beer labels as an indicator of strength; and by requiring that strength information appear on labels of many distilled spirits. *Id.* at 488-89. Section 6254(f)(3) does not suffer from any such irrationality: the statute incrementally increases individual privacy by minimizing the instances in which address information is unnecessarily disclosed.

The Ninth Circuit's analysis also ignores the state's efforts to strike a balance between maintaining individual privacy and furthering core First Amendment values. California unquestionably could adopt a complete prohibition on access to arrestee address records, which would more completely protect

the privacy of arrestees. *Id.* 14a. (Ironically, that may ultimately be the state's response if the decision below is allowed to stand.) But such a prohibition would deprive the press of address information, which although it would be constitutional would be inimical to the fundamental goals of the First Amendment. Section 6254(f)(3) constitutes a reasoned effort to avoid interfering with the press while at the same time preserving individual privacy where possible.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

James K. Hahn
Frederick N. Merkin
Byron R. Boeckman
Office of the City Attorney
1800 City Hall East
200 N. Main St.
Los Angeles, CA 90012

David Boies
(Counsel of Record)
BOIES & SCHILLER LLP
80 Business Park Dr.
Suite 110
Armonk, NY 10504
(914) 273-9800

Jonathan D. Schiller
Thomas C. Goldstein
BOIES & SCHILLER LLP
5301 Wisconsin Ave., NW
Suite 570
Washington, DC 20015

October 23, 1998

APPENDIX OF RELATED STATUTES

A. POLICE REPORT STATUTES

1. Ariz. Rev. Stat. § 28-667 (1998).
2. Cal. Gov't Code § 6254 (Deering 1997) (invalidated by United Reporting Publishing Corp. v. California Hgwy. Patrol, 146 F.3d 1133 (9th Cir.1998), aff'g 946 F. Supp. 822 (S.D. Cal. 1996)).
3. Colo. Rev. Stat. § 24-72-305.5 (1997) (sustained by Lanphere & Urbaniak v. Colorado, 21 F.3d 1508 (10th Cir.), cert. denied, 513 U.S. 1044 (1994)).
4. Fla. Stat. chs. 119.105, 316.066, 316.650, 327.301 (1998) (ch 316.650(11) invalidated by Babkes v. Satz, 944 F. Supp. 909 (S.D. Fla. 1996)).
5. Ga. Code Ann. §§ 33-24-53, 35-1-9 (1998) (§ 33-24-53(c) invalidated by Statewide Detective Agency v. Miller, No. 96-Civ-1033 (WBH), Order (N.D. Ga. Aug. 12, 1998); § 35-1-9 invalidated by Speer v. Miller, 15 F.3d 1007 (11th Cir. 1994), on remand, 864 F. Supp. 1294 (N.D. Ga. 1994)).
6. Haw. Rev. Stat. Ann. § 286-172 (Michie 1997).
7. Ky. Rev. Stat. Ann. § 189.635 (Michie 1996) (invalidated by Amelkin v. Commissioner, Dep't of St. Police, 936 F. Supp. 428 (W.D. Ky. 1996), on remand from Amelkin v. McClure, No. 94-6161, 1996 U.S. App. LEXIS 1414 (6th Cir. Jan. 9, 1996)).
8. La. Rev. Stat. Ann. § 32:398 (West 1998) (sustained by DeSalvo v. Louisiana, 624 So. 2d 897 (La. 1993), cert. denied, 510 U.S. 1117 (1994)).

9. Md. Code Ann., State Gov't § 10-616 (1997).
10. N.M. Stat. Ann. § 14-2A-1 (Michie 1998) (invalidated by Lavalle v. Udall, Civ. A. No. 94-0404-M, Order (D.N.M Feb. 16, 1996)).
11. Okla. Stat. tit. 51, § 24A.8 (1997); H.Bill 1665, 46th Leg., 2d. Sess. (Okla. 1997).
12. S.C. Code Ann. § 56-5-1275 (Law. Co-op. 1997) (sustained in Walker v. South Carolina Dep't of Highways & Pub. Trans., 466 S.E.2d 346 (S.C. 1995)).
13. Tex. Bus. & Com. Code Ann. § 35.54 (West 1998) (invalidated by Innovative Database Sys. v. Morales, 990 F.2d 217 (5th Cir. 1993)).

B. GENERAL PUBLIC RECORD STATUTES

1. Ariz. Rev. Stat. § 39-121.03 (1997).
2. Cal. Gov't Code §§ 6253, 6255 (Deering 1997).
3. Ky. Rev. Stat. Ann. § 61.870 (Michie 1996).
4. Md. Code Ann., State Gov't § 9-1015 (1997).
5. N.M. Stat. Ann. § 14-3-15.1 (Michie 1998).
6. N.Y. Pub. Off. Law § 89 (Consol. 1998).
7. R.I. Gen. Laws § 38-2-6 (1997).
8. S.C. Code Ann. §§ 30-4-50 (Law Co-op. 1997).
9. Wash. Admin. Code. § 292-10-040 (1997)
10. Wash. Rev. Code Ann. § 42.17.260 (Michie 1997).

C. MOTOR VEHICLE STATUTES

1. 18 U.S.C. 2721, 2722 (1998).
2. Ark. Code Ann. § 27-14-412 (Michie 1997).
3. Ariz. Rev. Stat. § 28-452 (1998).
4. 625 Ill. Comp. Stat. 5/2-123 (West 1998).

5. Mich. Stat. Ann §4.480(8) (Law. Co-op 1997).
6. 75 Pa. Cons. Stat. § 6114 (1997).
7. Utah Code Ann. § 41-1a-116 (1998).

D. PUBLIC ASSISTANCE STATUTES

1. 42 U.S.C.S. § 1306a (1998) (stating that state legislation governing public access to state disbursement records may include provisions restricting access for commercial purposes); See also, 45 C.F.R. § 205.50 (1998).
2. Ga. Code. Ann. § 49-4-14 (1997).
3. 305 Ill. Comp. Stat. 5/11-12 (West 1998).
4. Ind. Code. Ann. § 12-14-22-8 (Michie 1998).
5. La. Rev. Stat. Ann. § 46:56 (West 1998).
6. Mich. Stat. Ann. § 16.464 (Law. Co-op. 1997).
7. Neb. Rev. Stat. Ann. § 68-313.01 (Michie 1997).
8. N.Y. Soc. Serv. Law § 136 (Consol. 1998).
9. N.C. Gen. Stat. § 108A-80 (1997).
10. Vt. Stat. Ann. tit. 33 § 111 (1997).
11. H. Bill 3076, 55th Leg. (Wash. 1997).
12. Wis. Stat. § 49.32 (1997).

E. ELECTION STATUTES

1. 2 U.S.C. § 438 (1998) (regarding administrative provisions related to disclosure of federal campaign funds).
2. Ala. Code. § 17-22A-11 (1997).
3. Colo. Rev. Stat. §§ 1-45-111 to 112 (1997).
4. D.C. Code Ann. §§ 1-1433, 1456 (1998).
5. Haw. Rev. Stat. § 11-193 (1997).

6. Fla. Stat. ch. 98.095 (1997).
7. Idaho Code § 34-437 (1997).
8. Ind. Code. Ann. § 3-9-4-5 (Michie 1998).
9. Iowa Code § 68B.32A (1997).
10. Kan. Stat. Ann. §§ 25-2320a, 4154, 4186 (1997).
11. Md. Code Ann. art. 33, § 3-22 (1997).
12. Mich. Stat. Ann. §§ 4.1703(16), .1704(11) (1997).
13. Minn. Stat. §10A.02 (Supp. 1997).
14. Mo. Rev. Stat. §§ 115.158, 130.056 (1997).
15. Neb. Rev. Stat. Ann. § 32-330 (Michie 1997); Neb. Rev. Stat. Ann. § 49-14, 132 (Michie 1998).
16. Okla. Stat. tit. 74 § 4253 (1997).
17. Or. Rev. Stat. § 247.955 (1997).
18. S.D. Codified Laws § 12-25-34 (Michie 1998).
19. Wis. Stat. §§ 11.21-.22 (1997).
20. Wyo. Stat. Ann. § 22-2-113 (Michie 1997).

4. Ind. Code. Ann. § 5-14-3-5 (Michie 1998).
5. Md. R. Ann. 511 (1997).
6. Mich. Stat. Ann. § 24.1012 (Law/ Co-op. 1997).
7. N.C. Gen. Stat. § 132-1.4 (1997).
8. Or. Rev. Stat. §§ 192.501, 314.865 (1997).
9. S.C. Code Ann. § 30-4-40 (Law. Co-op. 1997).
10. Va. Code Ann. § 55-370 (Michie 1998).
11. Wash. Rev. Code Ann. §§ 19.182.010, 82.32.330 (Michie 1997).

F. MISCELLANEOUS

1. 5 U.S.C. app. § 105 (1998) (stating the requirements for public access to federal employee financial disclosure records); see also 5 C.F.R. 2634.603 (1998); 32 C.F.R. § 84.21 (1998); 32 C.F.R. pt. 1293 app. D. (1998); 45 C.F.R. 706.24 (1998); 47 C.F.R. 0.460, 19.743 (1998).
2. Ariz. Rev. Stat. § 36-136 (1998).
3. Conn. Gen. Stat. § 1-20b (1997); Pub. Act 97-99, substitute H. Bill 6883, 1997 Reg. Sess. (Conn.).

Cal. Gov. Code § 6254

Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:

* * * *

- (f) Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement, or licensing purposes, except that state and local law enforcement agencies shall disclose the names and addresses of persons involved in, or witnesses other than confidential informants to, the incident, the description of any property involved, the date, time, and location of the incident, all diagrams, statements of the parties involved in the incident, the statements of all witnesses, other than confidential informants, to the victims of an incident, or an authorized representative thereof, an insurance carrier against which a claim has been or might be made, and any person suffering bodily injury or property damage or loss, as the result of the incident caused by arson, burglary, fire, explosion, larceny, robbery, carjacking, vandalism, vehicle theft, or a crime as defined by subdivision (c) of Section 13960, unless the disclosure would endanger the safety of a witness or other person involved in the investigation, or unless disclosure would endanger the successful completion of the investigation or a related investigation. However, nothing in this division shall require the disclosure of that portion of

those investigative files that reflect the analysis or conclusions of the investigating officer.

Other provisions of this subdivision notwithstanding, state and local law enforcement agencies shall make public the following information, except to the extent that disclosure of a particular item of information would endanger the safety of a person involved in an investigation or would endanger the successful completion of the investigation or a related investigation:

- (1) The full name and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest, the amount of bail set, the time and manner of release or the location where the individual is currently being held, and all charges the individual is being held upon, including any outstanding warrants from other jurisdictions and parole or probation holds.
- (2) Subject to the restrictions imposed by Section 841.5 of the Penal Code, the time, substance, and location of all complaints or requests for assistance received by the agency and the time and nature of the response thereto, including, to the extent the information regarding crimes alleged or committed or any other incident investigated is recorded, the time, date, and location of occurrence, the time and date of the report, the name and age of the victim, the factual circumstances surrounding the crime or incident, and a general description of any injuries, property, or weapons involved. The name of a victim of any crime defined by Section 220, 261,

262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be withheld at the victim's request, or at the request of the victim's parent or guardian if the victim is a minor. When a person is the victim of more than one crime, information disclosing that the person is a victim of a crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code may be deleted at the request of the victim, or the victim's parent or guardian if the victim is a minor, in making the report of the crime, or of any crime or incident accompanying the crime, available to the public in compliance with the requirements of this paragraph.

(3) Subject to the restrictions of Section 841.5 of the Penal Code and this subdivision, the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalty of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator as described in Chapter 11.3 (commencing with Section 7512) of Division 3 of the Business and Professions Code, except that the address of the victim of any crime defined by Section 220, 261, 262, 264, 264.1, 273a, 273d, 273.5, 286, 288, 288a, 289, 422.6, 422.7, 422.75, or 646.9 of the Penal Code shall remain confidential. Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

UNITED REPORTING PUBLISHING CORP., a California Corporation, Plaintiff, vs. DANIEL E. LUNGREN, Attorney General for the State of California; THE CALIFORNIA HIGHWAY PATROL; DWIGHT O. HELMICK, JR., Commissioner of the California Highway Patrol; POLICE DEPARTMENT FOR THE CITY OF ALHAMBRA; POLICE DEPARTMENT FOR THE CITY OF CHULA VISTA; POLICE DEPARTMENT FOR THE CITY OF DALY CITY; POLICE DEPARTMENT FOR THE CITY OF DOWNEY; POLICE DEPARTMENT FOR THE CITY OF DUBLIN; POLICE DEPARTMENT FOR THE CITY OF FREMONT; POLICE DEPARTMENT FOR THE CITY OF HAYWARD; POLICE DEPARTMENT FOR THE CITY OF LOS ANGELES, POLICE DEPARTMENT FOR THE CITY OF LOS GATOS, POLICE DEPARTMENT FOR THE CITY OF MOUNTAIN VIEW; POLICE DEPARTMENT FOR THE CITY OF OAKLAND; POLICE DEPARTMENT FOR THE CITY OF OCEANSIDE; POLICE DEPARTMENT FOR THE CITY OF PALO ALTO; POLICE DEPARTMENT FOR THE CITY OF PLEASANTON; SHERIFF'S DEPARTMENT FOR THE COUNTY OF RIVERSIDE; POLICE DEPARTMENT FOR THE CITY OF SAN FRANCISCO; POLICE DEPARTMENT FOR THE CITY OF SOUTH SAN FRANCISCO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN BERNARDINO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN DIEGO; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SAN JOAQUIN; POLICE DEPARTMENT FOR THE CITY OF SAN PABLO; POLICE DEPARTMENT FOR THE CITY OF SANTA MONICA; SHERIFF'S DEPARTMENT FOR THE COUNTY OF SANTA CLARA; POLICE DEPARTMENT FOR THE CITY OF SUNNYVALE; Defendants.

Civ. No. 96-0888B (AJB)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

946 F. Supp. 822

November 27, 1996, FILED

COUNSEL: Guylyn R. Cummins, San Diego. Ben P. Jones, San Diego, For Plaintiff.

James K. Hahn, Los Angeles. Frederick N. Merkin, Los Angeles. Bryon R. Broeckman, Los Angeles. Linda A. Cabatic, Sacramento. Allen Sumner, Sacramento. Ian Fan, San Diego, For Defendant.

JUDGES: Rudi M. Brewster, UNITED STATES DISTRICT JUDGE

This case presents a facial challenge to a provision of the California Public Records Act, California Government Code § 6254, as that provision was amended, effective July 1, 1996, pursuant to Senate Bill 1059. The Court, having reviewed the moving and opposing papers and the oral arguments of counsel hereby GRANTS plaintiff's motion for summary judgment and DENIES defendants' motions for summary judgment.

I. Background

Prior to July 1, 1996, the California Public Records Act provided that "state and local law enforcement agencies shall make public . . . the full name, current address, and

occupation of every individual arrested by the agency[.]" Cal. Gov. Code § 6254. This made arrestee addresses available to anyone for any purpose. Cal. Gov. Code § 6254(f) was amended, effective July 1, 1996, to prohibit the release of arrestee addresses only to people who intend to use those addresses for commercial purposes. Cal. Gov. Code § 6254(f)(3) provides that state and local law enforcement agencies shall make public:

the current address of every individual arrested by the agency and the current address of the victim of a crime, where the requester declares under penalties of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator. . . . Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

Plaintiff United Reporting Publishing Corp. ("United Reporting") is a private publishing service that has been providing, under the former version of this statute, the names and addresses of recently arrested individuals to its clients. These clients include attorneys, insurance companies, drug and alcohol counselors, religious counselors, driving schools, and others. The defendants remaining in this action are various state and local law enforcement agencies.

Plaintiff's complaint seeks declaratory judgment and injunctive relief pursuant to 42 U.S.C. § 1983 to hold the amendment to section 6254 unconstitutional under the First Amendment to the United States Constitution (first cause of action), and unconstitutional under the Fourteenth Amendment to the United States Constitution (second, third, and fourth causes of action).

Plaintiff United Reporting and defendants County of San Diego Sheriff's Department, California Highway Patrol, and Los Angeles Police Department have filed cross-motions for summary judgment.

II. Issue

Is the amendment to Cal. Gov. Code § 6254 an unconstitutional limitation on plaintiff's commercial speech?

III. Discussion

A. Scope of First Amendment Protection

Courts have historically recognized a common law right, but not an absolute right, of access to certain government records, including judicial records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). In this case, this common law right has been supplanted by the California Public Records Act of 1968 which made public all arrest records of law enforcement agencies. The issue, therefore, is whether plaintiff is protected by an overriding federal constitutional right of access to this particular government information.

Courts have uniformly answered this question in the negative: there is no constitutional right, and specifically no First Amendment right, of access to all governmental records. *Houchins v. KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) ("This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control. . . . [Accordingly], there is no discernible basis for a constitutional duty to disclose, or for standards governing disclosure of or access to information"); *Lanphere & Urbanik v. Colorado*, 21 F.3d 1508, 1511 (10th Cir. 1994) (same); *Calder v. I.R.S.*, 890 F.2d 781, 783-84 (5th Cir. 1989) ("the right to speak and publish does not carry with it an unrestricted license to gather information"); *Speer v. Miller*, 864 F. Supp. 1294, 1297-98 (N.D. Ga. 1994). The First Amendment directly protects the expression of information already obtained; it does

not guarantee access to the sources of information. *Houchins*, 438 U.S. at 10 ("reference to a public entitlement to information mean[s] no more than that the government cannot restrain communication of whatever information the media acquire--and which [the government] elect[s] to reveal"). As explained by the Supreme Court:

There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy The public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.

The Constitution, in other words, establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, we must rely, as so often in our system we must, on the tug and pull of the political forces in American society.

Id. at 14-15, (quoting Hon. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 636 (1975)).¹

¹ Two exceptions have been crafted to the general rule that there is no First Amendment right of access to government information. First, the Supreme Court has found a constitutional right of public access to criminal trials and court proceedings. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-78 (1980) ("In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those guarantees."); *Gannett v. Depasquale*, 443 U.S. 368 (1979) (no right to attend suppression hearing); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right to attend jury voir dire); *Associated Press v. United States Dist. Court*, 705 F.2d 1143 (9th Cir. 1983) (right of access to pretrial criminal proceedings and pretrial documents).

Second, courts have found a First Amendment right of access to judicial records. See *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985) (finding a common law right to inspect and copy judicial records); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (finding a First Amendment right of access to records of criminal cases); *Associated Press*, 705 F.2d at 1145 (finding a

The Court concludes that the First Amendment does not provide plaintiff with a blanket constitutional right of access to arrestee addresses; the state could constitutionally prevent everyone from having access to this information. This does not, however, foreclose plaintiff's claim. As previously outlined, the instant statute is an amendment to the California Public Records Act which makes all arrestee information public, but then limits access only to those who plan to use arrestee addresses in commercial speech. The amended statute states that "address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals[.]" Cal. Gov. Code § 6254(f)(3). Functionally, this is a limitation on commercial speech. The government is the only source of this information and by statute is disseminating it to everyone except commercial users. The government cannot denominate this a limitation on access in order to achieve a limitation on non-preferred speech. This limitation on access constitutes an indirect limitation on commercial speech.

Recently, two circuits held similar statutes limiting the right of access to government arrest information indirectly implicate First Amendment concerns because such statutes indirectly "punish" certain (commercial), but not all, uses of the information.² *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994), and *Speer v. Miller*, 15 F.3d 1007 (11th

right of access to pretrial documents); *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986) (right of access to plea hearings and sentencing hearings).

Neither of these exceptions to the general *Houchins* rule assists plaintiff. Both of these exceptions are premised on the long tradition of open trials dating back to England and the colonial United States. The Third Circuit, in *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164 (3rd Cir. 1986), created a two prong test for determining whether the public has a constitutional right of access to judicial proceedings or documents. First, there must be a tradition of access to these items, and second, public access must play a significant role in the functioning of the particular process in question. *Id.* at 1174. While there is a long tradition of access to documents placed in official court records, there has been no showing that there is a long tradition of public access to law enforcement blotter sheets and arrest records, or that the public has played a significant role in the arrest process.

² There appears to be no Ninth Circuit authority on this issue.

Cir. 1994), *on remand*, 864 F. Supp. 1294 (N.D. Ga. 1994),³ both involved state statutes that denied commercial users access to criminal records.⁴ In both cases, the courts acknowledged that there is no general First Amendment right of access to criminal justice records. *Lanphere*, 21 F.3d at 1512; *Speer*, 864 F. Supp. at 1297-98. Both courts, however, went on to conclude that the First Amendment was implicated by the respective state statutes. As explained by *Lanphere*, the First Amendment is implicated because a direct ban on access to information can serve as an indirect ban on the usage of such information in speech, and therefore can constitute impermissible content-based regulation of speech:

Although criminal justice records themselves do not constitute speech, the Colorado Legislature has drawn a regulatory line based on the speech use of such records. [The challenged statute] disallows the release of records to those wishing to use them for commercial speech, while allowing the release of the same records to those having a noncommercial purpose. Because commercial speech is protected under the First Amendment (though it is accorded lesser protection than 'core' First Amendment speech), and because such speech includes direct mail

³ The *Speer* decision of the District Court is after remand from the Eleventh Circuit which vacated a contrary first decision of the District Court. In vacating and remanding the District Court's first decision, the Eleventh Circuit stated "[a] mere reading of this statute indicates that it probably impinges upon Speer's commercial speech." *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994).

⁴ In *Lanphere*, the state statute in question required the government custodian to "deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1510-11. In *Speer*, the statute in question declared it "unlawful for any person to inspect or copy any records of a law enforcement agency to which the public has a right of access . . . for the purpose of obtaining the names and addresses of the victims of crimes or persons charged with crimes . . . for any commercial solicitation of such individuals or relatives of such individuals." 15 F.3d at 1009

solicit on, what we have in the end is a content-based restriction on protected speech.

21 F.3d at 1513 (citations omitted); *see Speer*, 864 F. Supp. at 1299; *see also Minneapolis Star v. Minnesota Dept. of Revenue*, 460 U.S. 575 (1983) (use tax on paper and ink levied only on producers of periodic publications singled out the press for differential treatment and was an unconstitutional indirect limitation on speech).

The Court concludes that the amended Cal. Gov. Code § 6254(f) is a content-based indirect limitation on commercial speech which implicates the First Amendment.

B. Central Hudson Commercial Speech Test

Since First Amendment commercial speech interests are implicated by the amended Cal. Gov. Code § 6254, the statute must be subjected to the four part test set out in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 566 (1980).

[1] At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. [3] If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

1. Is Plaintiff's Commercial Speech Activity Lawful?

There is no contention that Plaintiff's proposed use of this information is misleading or is not a lawful activity.

2. Are the Governmental Interests Substantial?

The defendants advance two substantial government interests which they claim support this statute. The legislative history quotes Senator Peace as follows:

From a law enforcement perspective, the processing of the requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

Legislative History (June 4, 1996 letter), p. 4. Both the *Speer* and *Lanphere* courts found that the governmental interest in protecting the privacy of arrestees was substantial. *Speer*, 864 F. Supp. at 1302; *Lanphere*, 21 F.3d at 1514-15; *see also Florida Bar v. Went for It, Inc.*, 132 L. Ed. 2d 541, 115 S. Ct. 2371, 2376-80 (1995) (upholding 30 day ban on direct mail attorney solicitations based on the government's substantial interest in protecting the privacy and tranquility of personal injury victims); *Carey v. Brown*, 447 U.S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980) ("the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society"). With respect to the government's concern about the fiscal burden of producing arrestee information, the direct costs of duplicating would be paid by plaintiff, but the costs of aggregating and organizing all of the information and the labor involved in duplicating are presently borne by the law enforcement agencies. Given the strictures of governmental budgets, the government has an interest in minimizing these costs.

3. Whether the Restriction Directly and Materially Advances the Governmental Interests

To establish that the restriction on commercial speech advances the above-identified government interests in a

direct and material way, the government body must demonstrate that the harms are real and that the restrictions will, in fact, alleviate those harms to a material degree. *Florida Bar*, 115 S. Ct. at 2377.

First, it is doubtful that this amended statute will save defendants any money at all. The costs of gathering and preparing arrestee information will still be incurred under this statute because law enforcement agencies will still have to compile the identical arrestee data for journalists, government employees and other non-commercial users of the information. The additional costs of making copies for commercial users would be marginal, especially when they can be charged all of the costs of duplication. Moreover, under this statute the law enforcement agencies still have to compile and copy all arrestee information for commercial users except for addresses. The simple omission of addresses will not minimize law enforcement agency expenses.⁵

Second, the amended statute also fails to advance the state's interest in protecting the privacy and tranquility of its residents. In its most recent pronouncement on commercial speech, the Supreme Court upheld a statute prohibiting lawyers from sending direct mail solicitations to accident victims within 30 days of the accident. *Florida Bar*, 115 S. Ct. at 2381. The asserted state interest behind the statute was to protect "the personal privacy and tranquility of [Florida's] citizens from crass commercial intrusion by attorneys upon their personal grief in times of trauma." *Id.* at 2379. The Supreme Court concluded that the statute directly and materially advanced this interest by requiring attorneys to wait 30 days before sending direct mail solicitations to victims. *Id.*

The Supreme Court's holding in *Florida Bar* does not control the outcome in this case for two reasons. First, the ban

⁵ If this were the state's real concern, they could appropriately charge commercial users for the copies and use the additional revenue to cover the marginal cost increase, if any. Plaintiff has expressed its willingness to pay any additional costs incurred because of its information requests.

at issue in *Florida Bar* only lasted for 30 days after the accident, whereas the ban on publication of arrestee addresses in section 6254(f)(3) is permanent. Permanent bans on attorney direct mail solicitation have been invalidated. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 100 L. Ed. 2d 475, 108 S. Ct. 1916 (1988). Second, the purpose of the statute in *Florida Bar* was to protect vulnerable victims from offensive attorney solicitation practices. Presumably accident victims would be most vulnerable immediately after the accident and would seldom require immediate legal representation, but once they have had a month to recover, they should be able to evaluate attorney solicitations more effectively. Arrestees, in contrast, potentially could need immediate legal assistance to prevent them from making self-incriminating statements, to help them obtain bail, and to prepare for any subsequent criminal proceedings. This interest so heavily outweighs any concern that arrestees may find such attorney solicitations offensive that the defendants' justification borders on the disingenuous.

The two courts that dealt with statutes substantially similar to Cal. Gov. Code § 6254(f) split on whether the statutes materially advanced the state's interest in protecting the privacy of its citizens. In *Lanphere*, the Tenth Circuit held that the state's interest in protecting privacy is directly advanced when the State no longer allows access to names and addresses of those charged with misdemeanor traffic violations and DUI. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable. 21 F.3d at 1515.⁶ The *Speer* court reached the opposite conclusion.

⁶ In *Lanphere*, the state statute in question required the government custodian to "deny any person access to records of official actions and criminal justice records unless such person signs a statement which affirms that such records shall not be used for the direct solicitation of business for pecuniary gain." 21 F.3d at 1510-11.

This Court believes that the narrow and selective manner in which the Georgia statute attempts to further the asserted interest of protecting people's privacy betrays the state's true focus and its inability to serve the state's asserted interest. The State does not restrict all (or probably even most) possible invasions of a person's privacy. Anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations. The media may peruse and report the records, academicians may employ them in their research, statisticians may gather their contents for inclusion in their computations, inventive entrepreneurs may use their contents for the commercial solicitation of individuals neither named nor related to persons named therein, curiosity seekers may browse through them in search of titillation, or personal enemies may even extract information from them for diabolical (yet otherwise lawful) purposes. Only entities intending to use the names and addresses of those mentioned therein to solicit those people or their relatives for commercial purposes are denied access. The restriction's exceedingly narrow scope betrays it as a statute designed not to protect privacy but, instead, to prevent solicitation practices. And as *Shapero* teaches, a person's privacy is not infringed by the solicitation, but by the solicitor's discovery of the information that leads to the solicitation.

Accordingly, the Court finds that the Georgia statute does not directly advance the state's asserted interest because it advances that interest hardly at all and because it attempts to protect those named in the records primarily by preventing solicitations rather than by preventing significant access.

The Court agrees with the reasoning of the *Speer* court. It is hard to see how direct mail solicitations invade the privacy of arrestees. If they don't like the solicitation, they can simply throw it away. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 72, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983) (the short though regular journey from mail box to trash can is an acceptable burden, at least as far as the Constitution is concerned). At worst, it could be somewhat embarrassing for them to receive a letter from an attorney offering services to them now that they are a 'suspected criminal.' It may also be embarrassing for arrestees to have their addresses published in newsletters, but it would only be marginally more embarrassing, if at all, than just having their name published. Further, the statute still allows their name and address to be published in newspapers, broadcast on television, and/or obtained by an employer or even an enemy. These are potentially much more pervasive invasions of privacy, yet the statute allows them. Moreover, United Reporting attaches affidavits from many arrestees stating that they do not feel that the solicitations invaded their privacy and that they found them helpful in obtaining legal representation or other services. Defendants filed no contrary affidavits. The *Speer* court appears correct that one of the real reasons behind the statute is to prevent the solicitations themselves because vulnerable people are lured into bad deals with lawyers. The statute may also have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel.⁷ The Court concludes that the statute, rather than protecting the privacy of its citizens, actually hinders the ability of arrestees to obtain needed counsel and advice to deal with their legal problems.

Since Cal. Gov. Code § 6254(f)(3) does not directly and materially advance the state's asserted interests in

⁷ The Court notes that it was state and local law enforcement agencies and district attorneys' offices which proposed this amendment to § 6254.

minimizing costs and protecting the privacy of arrestees, it fails the third prong of the *Central Hudson* test.

4. Whether the Regulation is Narrowly Drawn

The final prong of the analysis is whether the statute is narrowly drawn. This test requires a 'reasonable fit' between the legislature's ends and the means chosen to accomplish those ends. *Florida Bar*, 115 S. Ct. at 2380. There is not a reasonable fit between the cost rationale and prohibiting access to commercial users of the information. The law enforcement agencies must still compile and reproduce the information for non-commercial users. They must still provide all information except for the addresses to commercial users. Moreover, commercial users can be charged fees for any additional costs incurred. The amendment is not narrowly drawn because it does not decrease expenses of law enforcement agencies.

Whether there is a reasonable fit between the privacy rationale and prohibiting access to commercial users of the information collapses into the same analysis as whether the statute directly and materially advances the state interest. Since the prohibition on commercial use of the information does not materially advance the state's interest in protecting the privacy of its citizens, there is not a reasonable fit between the legislature's means and ends.

Since Cal. Gov. Code § 6254(f)(3) is more extensive than necessary to accomplish its asserted purpose, it also fails the fourth prong of the *Central Hudson* test.

The Court therefore finds Cal. Gov. Code § 6254(f)(3) to be an unconstitutional limitation on commercial speech.

C. Plaintiff's other causes of action

Since the Court finds Cal. Gov. Code § 6254(f)(3) unconstitutional as an impermissible limitation on commercial speech, the Court does not reach plaintiff's other causes of action.

IV. Conclusion

For the foregoing reasons, the Court finds that Cal. Gov. Code § 6254(f)(3) is an impermissible restriction on commercial speech which violates the First Amendment. For this reason, the Court hereby GRANTS plaintiff's motion for summary judgment and DENIES defendants' motions for summary judgment.

Plaintiff shall lodge a proposed judgment of declaratory and injunctive relief within twenty days with counsel and the Court. Defendants shall have ten days to object to the form of the judgment, whereupon it shall stand submitted for Court revision and signature.

IT IS SO ORDERED.

Dated: NOV 27 1996

Rudi M. Brewster
UNITED STATES DISTRICT JUDGE

UNITED REPORTING PUBLISHING CORP., a California corporation, Plaintiff-Appellee, v. CALIFORNIA HIGHWAY PATROL, Defendant, and LOS ANGELES POLICE DEPARTMENT, Defendant-Appellant.

No. 97-55111

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

146 F.3d 1133

June 25, 1998, Filed

COUNSEL: Byron R. Boeckman, James K. Hahn, Fredrick N. Merkin, City Attorneys, Los Angeles, California, for defendant-appellant Los Angeles Police Department.

Guylyn R. Cummins, Ben P. Jones, Gray, Cary, Ware & Freidenrich, San Diego, California, for plaintiff-appellee United Reporting.

JUDGES: Before: Jerome Farris, Diarmuid F. O'Scannlain, and Ferdinand F. Fernandez, Circuit Judges. Opinion by Judge O'Scannlain.

O'SCANNLAIN, Circuit Judge:

We must decide whether a state regulation that prohibits the release of arrest information for commercial purposes violates the First Amendment.

Prior to July 1, 1996, California Government Code § 6254 provided that "state and local law enforcement agencies shall make public . . . the full name, current address, and occupation of every individual arrested by the agency." Cal. Gov. Code § 6254(f). This provision made arrestee addresses available to anyone for any purpose. On July 1, 1996, however, California Government Code § 6254(f) was amended to prohibit the release of arrestee addresses to people who intend to use those addresses for commercial purposes. California Government Code § 6254(f) now provides that state and local law enforcement agencies shall make public:

the current address of every individual arrested by the agency and the current address of the victim of a crime, where the register declares under penalties of perjury that the request is made for a scholarly, journalistic, political, or governmental purpose, or that the request is made for investigation purposes by a licensed private investigator Address information obtained pursuant to this paragraph shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury.

Cal. Gov. Code § 6254(f)(3) (emphasis added).

United Reporting Publishing Corporation ("United Reporting") is a private publishing service that had been providing, under the old version of the statute, the names and addresses of recently arrested individuals to its clients. These clients include attorneys, insurance companies, drug and alcohol counselors, religious counselors, and driving schools. The Los Angeles Police Department ("LAPD") maintains certain records relating to arrestees, including names, addresses, and the charges of arrest.

Pursuant to 42 U.S.C. § 1983, United Reporting filed a complaint before the district court seeking declaratory judgment and injunctive relief on the grounds that the amendment to § 6254 was unconstitutional under the First

Amendment and the Fourteenth Amendment to the United States Constitution. The district court agreed, holding that California Government Code § 6254(f)(3) violated the First Amendment. *See United Reporting Publishing Corp. v. Lungren*, 946 F. Supp. 822, 829 (S.D. Cal. 1996). The district court did not reach United Reporting's Fourteenth Amendment argument. The LAPD timely appealed.¹

II

The LAPD contends that the district court erred in holding that § 6254(f)(3) violates the First Amendment right to freedom of expression. Specifically, the LAPD maintains that the district court misapplied the four-part test laid down by the Supreme Court in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), for analyzing the constitutionality of government regulations limiting so-called "commercial" speech.

For its part, United Reporting argues that, contrary to the district court's finding, the activity in which it engages, selling arrestee information to clients, is not commercial speech at all, but noncommercial speech, the regulation of which is subject to strict scrutiny under the United States and California constitutions. In the alternative, United Reporting claims that § 6254(f)(3) burdens its dissemination of truthful, nonmisleading commercial speech concerning the right to retain competent counsel and other assistance in violation of the United States and California constitutions.

III

We start with a comment on the protection provided under the First Amendment to what has been commonly

¹ Before the district court, the LAPD was joined by the San Diego Sheriff's Department and the California Highway Patrol. The LAPD is the only party to appeal the district court's decision.

designated "commercial" speech. Although the Supreme Court once held that the First Amendment did not protect commercial speech, *see Valentine v. Chrestensen*, (1942), it repudiated that position in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). The current debate centers not on whether commercial speech is a form of expression entitled to constitutional protection, but on the validity of the distinction between commercial and noncommercial speech. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."); Kozinski & Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634-38 (1990) (questioning basis for distinction). We are compelled, however, under the Supreme Court's current jurisprudence, to afford commercial speech less protection from governmental regulation than some other forms of expression. *See, e.g., United States v. Edge Broadcasting Co.*, 509 U.S. 418, 426 (1993) ("Our decisions . . . have recognized the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. The Constitution therefore affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.") (citations omitted). Consequently, restrictions that might be violative of the First Amendment in other areas of expression may be tolerated in the realm of commercial speech. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1330 (9th Cir. 1997).

As an initial matter, we must address United Reporting's claim that it uses arrestee information to engage in fully-protected noncommercial speech, the regulation of which is subject to strict scrutiny under the United States and California constitutions, not commercial speech, and that the district court erred in holding otherwise. United Reporting maintains that commercial speech has been "defined and limited" by the Supreme Court to "speech which does 'no more

than propose a commercial transaction."² *Virginia State Bd.*, 425 U.S. at 762 (citations omitted). According to United Reporting, speech which goes beyond the mere proposal of such a transaction and involves the passing of ideas and information - including ideas and information necessary to the exercise of the Sixth Amendment right to retain the assistance of counsel - cannot be considered mere commercial speech.

The definition of commercial speech is not as settled as United Reporting would have us believe, however. Although "there is no longer any room to doubt that what has come to be known as 'commercial speech' is entitled to the protection of the First Amendment . . . more subject to doubt . . . are the precise bounds of the category of expression that may be termed commercial speech . . ." *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 637 (1985). United Reporting is correct that speech which "merely proposes a commercial transaction" falls within the boundaries of commercial speech; indeed, this is the "core notion" of commercial speech. *Bolger v. Youngs Drug Products*, 463 U.S. 60, 66, 77 L. Ed. 2d 469, 103 S. Ct. 2875 (1983). This "core notion" is the beginning of our inquiry, however, not the end, as United Reporting claims. In *Central Hudson*, the Supreme Court indicated that it would regard as commercial speech any "expression related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This is obviously broader than speech which proposes a commercial transaction; people often discuss their economic interests without proposing commercial transactions. The Supreme Court has abstained from creating bright-line rules in this area and so should we. See *Bolger*, 463 U.S. at 66-68 (noting that advertisements are not necessarily commercial speech despite fact that advertiser has an economic motivation and that linking advertisements to important public issues does not necessarily entitle speech to constitutional protection afforded noncommercial speech). Hence, we must examine the disputed communication in light of its surrounding circumstances to determine whether it is entitled to the qualified protection accorded to commercial speech.

That said, United Reporting's speech would be considered commercial under either a broad or a narrow definition. United Reporting makes an effort to link its speech to that of its clients' solicitations to arrestees in an effort to demonstrate that it does more than propose an economic transaction. This effort fails. United Reporting sells arrestee information to clients; nothing more. Its speech can be reduced to, "I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at the Y price." See *Virginia State Bd.*, 425 U.S. at 762. This is a pure economic transaction, see *Ficker v. Curran, Jr.*, 119 F.3d 1150, 1153 (4th Cir. 1997), comfortably within the "core notion" of commercial speech. *Bolger*, 463 U.S. at 66. Although this does not disqualify United Reporting from First Amendment protection, see *Virginia State Bd.*, 425 U.S. at 762, it does mean that its speech is entitled to only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 56 L. Ed. 2d 444, 98 S. Ct. 1912 (1978).²

IV

In *Central Hudson*, the Supreme Court articulated a four-part test under which to analyze the constitutionality of government regulations limiting commercial speech:

At the outset, (1) we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, (2) we ask whether the asserted governmental interest is substantial. If both inquiries yield positive

² It is not at all clear that the clients are engaging in noncommercial speech in any event. Every other court which has considered a statute similar to § 6254(f)(3) has found that attorney solicitation of arrestees under these circumstances constitutes commercial speech. See, e.g., *Moore v. Morales*, 63 F.3d 358, 361 (5th Cir. 1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994); *Speer v. Miller*, 15 F.3d 1007, 1010 (11th Cir. 1994).

answers, (3) we must determine whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566 (enumeration added).

The parties agree that the speech at issue is neither illegal nor misleading under the first prong. Rather, their dispute centers around the remaining three prongs of *Central Hudson*.

A Before the district court, the LAPD and its codefendants advanced two governmental interests in support of § 6254(f)(3):

From a law enforcement perspective, (1) the processing of the requests puts a tremendous strain on already scarcely allocated time and resources. From a consumer perspective, (2) this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

United Reporting, 946 F. Supp. at 826 (enumeration and emphasis added) (quoting Legislative History of § 6254(f)(3)). Only the second interest, protecting the privacy of arrestees, need concern us here.³

The LAPD has failed to challenge this finding on appeal. Consequently, it has waived any challenge to the district court's finding on the cost issue. See *Officers for Justice v. Civil Service Commission*, 979 F.2d 721, 726 (9th Cir. 1992)

³ Although the district court found the asserted governmental interest in minimizing the costs of producing arrestee information to be substantial, see *United Reporting*, 946 F. Supp. at 826, it held that § 6254(f)(3) does not directly and materially advance this interest and, therefore, failed the third *Central Hudson* prong. See *id.* at 829.

(holding that failure to raise argument in opening brief constitutes waiver). Hence, the only interest at issue here is the asserted governmental interest in protecting the privacy of arrestees.

The district court found the interest in protecting the privacy of arrestees to be substantial. See *United Reporting*, 946 F. Supp. at 826. The district court was persuaded by the fact that numerous other courts considering similar statutes have reached the same conclusion. *Id.* (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625-33 (1995); *Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508, 1513-14 (10th Cir. 1994); *Speer v. Miller*, 864 F. Supp. 1294, 1297-98 (N.D. Ga. 1994)). Its finding is well-grounded: "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471, 65 L. Ed. 2d 263, 100 S. Ct. 2286 (1980). Indeed, "[the Supreme Court's] precedents . . . leave no room for doubt that 'the protection of potential clients' privacy is a substantial state interest.'" *Florida Bar*, 515 U.S. at 625. The Court has "noted that 'a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions.'" *Id.* (quoting *Frisby v. Schultz*, 487 U.S. 474, 484-85, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988)). Hence, we hold that the district court was correct in finding the privacy interest of arrestees to be substantial.

B Determining the asserted interest in privacy to be substantial does not end our inquiry, however. Rather, we now turn to *Central Hudson*'s third prong, whether the challenged regulation "advances the Government's interest 'in a direct and material way.'" *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). The LAPD, the "party seeking to uphold [the] restriction on commercial speech[,] carries the burden of justifying it." *Bolger*, 463 U.S. at 71 n.20. This burden may not be satisfied by "mere speculation or conjecture." *Edenfield*, 507 U.S. at

770. Instead, "a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Coors Brewing*, 514 U.S. at 487 (quoting *Edenfield*, 507 U.S. 761 at 770). "The regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Edenfield*, 507 U.S. at 770 (quoting *Central Hudson*, 447 U.S. at 564).

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and tranquility of its residents. *See United Reporting*, 946 F. Supp. at 827-29. The LAPD claims that the district court erred in so finding, arguing that a prohibition against the release of arrestee information "reduces the opportunity for commercial interests to create and maintain an unreliable criminal history information bank which could have the effect of destroying the employment potential of the innocent, the reformed, the pardoned and the young" and prevents the "direct intrusion into the private lives and homes of arrestees and victims."

First, the LAPD has provided no evidence whatsoever in support of its contention that there is a danger that commercial interests would create "unreliable criminal history information banks" if they had access to arrestee addresses. In fact, these addresses were available to commercial interests prior to the amendment of § 6254 and, as far as we can tell, no commercial interests have ever maintained the aforementioned "criminal history information banks." This asserted harm appears to be no more than speculation and conjecture, which is insufficient to sustain a restriction on commercial speech. *See Coors Brewing*, 514 U.S. at 487. Because the LAPD has failed to sustain its burden of proving that this harm is real, we need not consider whether the restriction will alleviate the asserted harm to a material degree. *See id.*

The second harm asserted by the LAPD, preventing the "direct intrusion into the private lives and homes of

arrestees and victims," is somewhat more weighty. The district court rejected the contention that § 6254(f)(3) directly and materially advances the governmental interest in protecting the privacy and tranquility of its residents. *See United Reporting*, 946 F. Supp. at 827. The district court found that § 6254(f)(3) does not restrict all (or probably even most) possible invasions of a person's privacy. *See id.* at 828. It noted that "anyone may access the records in question so long as they do not do so with an eye towards using the information for certain types of commercial solicitations." *Id.* (quoting *Speer*, 864 F. Supp. at 1302). The fact that journalists, academicians, curiosity seekers, and other noncommercial users may peruse and report on arrestee records, the district court observed, belies the LAPD's claim that the statute is actually intended to protect the privacy interests of arrestees. *See id.* Instead, it appears to be more directed at preventing solicitation practices. *See id.* The district court also noted that "it is hard to see how direct mail solicitations invade the privacy of arrestees. If they don't like the solicitation, they can simply throw it away." *Id.*; *see also Bolger*, 463 U.S. at 72 ("The First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech. Recipients of objectionable mailings, however, may effectively avoid further bombardment of their sensibilities simply by averting their eyes. Consequently, the short, though regular journey from the mail box to the trash can . . . is an acceptable burden, at least so far as the Constitution is concerned.") (citations omitted). The district court correctly remarked that the privacy of arrestees was not invaded by the solicitation itself, but by the solicitor's discovery of the information that led to the solicitation. *See United Reporting*, 946 F. Supp. at 828 (citing *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988) ("The [privacy] invasion, if any, occurs when the lawyer discovers the recipient's legal affairs, not when he confronts the recipient with the discovery [through a targeted direct-mail solicitation].")).⁴ For these reasons, the district

⁴ The LAPD claims that the district court erred in not following the

court held that § 6254(f)(3) failed the third prong of *Central Hudson*. See 946 F. Supp. 829.

We agree with the district court. The myriad of exceptions to § 6254(f)(3) precludes the statute from directly and materially advancing the government's purported privacy interest. See *Valley Broadcasting Co.*, 107 F.3d at 1334. We take our direction from *Coors Brewing*, 514 U.S. 476, 131 L. Ed. 2d 532, 115 S. Ct. 1585, in which the Supreme Court held that 27 U.S.C. § 205(e)(2), which prohibited brewers from disclosing the alcohol content of beers on their labels, violated the First Amendment. See *id.* at 487-89. The Court held that the government's asserted interest in avoiding alcohol "strength wars" was substantial, but that § 205(e)(2) did not directly advance that interest "because of the overall irrationality of the Government's regulatory scheme." *Id.* at 488. In reaching its decision, the Court emphasized the numerous exceptions to § 205(e)(2), including the exception for wines and distilled spirits, which were allowed to list alcohol content on their

Tenth Circuit's decision in *Lanphere & Urbaniak*, 21 F.3d 1508, which concerned a similar statute. In that case, the Tenth Circuit held that it had "no trouble" finding that the state's interest in protecting privacy was directly advanced by the statute in question. Unfortunately, our sister circuit failed to provide any analysis in support of its conclusion. See *id.* at 1515. Instead, the court simply asserted:

The State's interest in protecting privacy is directly advanced when the State no longer allows access to the names and addresses of those charged with misdemeanor traffic violations and [Driving Under the Influence]. Further, refusing access to such information reasonably directly advances the State's interest in lessening the danger of overreaching by solicitors where potential solicitation recipients may be particularly vulnerable.

Id. (emphasis added). The district court was correct not to follow *Lanphere*. *Lanphere* fails to take into account the Supreme Court's decision in *Edenfield*, 507 U.S. at 767 (holding that the second prong of *Central Hudson* requires the challenged regulation to advance the state interests "in a direct and material way," not merely a direct or "reasonably" direct way), and is in conflict with *Coors Brewing*, 514 U.S. 476, 131 L. Ed. 2d 532, 115 S. Ct. 1585, and our decision in *Valley Broadcasting*, 107 F.3d 1328, which we will discuss *infra*.

labels, and the failure to extend the ban on disclosing alcohol content to advertisements. See *id.* The Court held that "there is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effects." *Id.* at 489.

In *Valley Broadcasting*, we considered whether federal regulations which criminalized the broadcast of advertisements for casino gambling violated the First Amendment. See *Valley Broadcasting*, 107 F.3d at 1336. Applying *Coors Brewing*, we held that the federal ban on broadcast advertisements did not directly and materially advance the government's interests in reducing public participation in commercial lotteries and in protecting those states which chose not to permit casino gambling within their borders. See *Valley Broadcasting*, 107 F.3d at 1334-36. We were compelled to reach this result in light of the numerous exceptions to the ban, including those for state-run lotteries, fishing contests, not-for-profit lotteries, and gaming conducted by Indian tribes. See *id.* As did the Court in *Coors Brewing*, we held that the regulatory scheme could not directly and materially advance its aim while other provisions of the same statute directly undermined and counteracted its effects. See *Valley Broadcasting*, 107 F.3d at 1334.

Likewise here, we are compelled to hold that the numerous exceptions to § 6254(f)(3) for journalistic, scholarly, political, governmental, and investigative purposes render the statute unconstitutional under the First Amendment. It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes. Having one's name, crime, and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally). The exceptions to § 6254(f)(3) "undermine and counteract" the asserted governmental interest in preserving privacy just as

surely as did the exceptions in *Coors Brewing and Valley Broadcasting*. We must therefore conclude that § 6254(f)(3) fails to satisfy *Central Hudson*.⁵

V

Having concluded that § 6254(f)(3) violates *Central Hudson*, the district court properly struck it down as an unconstitutional infringement of United Reporting's First Amendment rights.⁶

AFFIRMED.

⁵ Because we conclude that the challenged regulation does not directly advance the asserted governmental interests, we need not reach the final prong of *Central Hudson*. See *Valley Broadcasting*, 107 F.3d at 1336 n.9.

⁶ Because we hold that the challenged regulation violates the First Amendment, we do not reach United Reporting's equal protection, due process, or overbreadth arguments.